

**IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.**

**CASE NO.: 16-2006-CA-002361-XXXX
DIVISION: CV-B**

**THE EPISCOPAL CHURCH IN THE)
DIOCESE OF FLORIDA, INC.,)**

Plaintiff,)

v.)

**THE REVEREND NEIL G. LEBHAR,)
WILLIAM SCHROEDER, JOEY)
NICHOLS, MARY REILLY, JAN)
THORWART, LYLE RAMSAY and)
DORALEE SIMKO, the Rector,)
Wardens and Vestry of The Church)
of the Redeemer,)**

Defendants.)

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case came before the Court for a hearing on “Diocese’s Motion for Summary Judgment,” filed by Plaintiff The Episcopal Church in the Diocese of Florida, Inc. (“the Diocese”) The motion requested entry of a summary judgment in Plaintiff’s favor on both counts of the Plaintiff’s Complaint and all three counts of the Defendants’ Amended Counterclaim.

In Count One of the Complaint, the Diocese sought to recover possession of the real property on which The Church of the Redeemer is located (the “Redeemer Church Property”). In Count Two of the Complaint, Plaintiff sought an accounting of the real and personal property in the possession of The Church of the Redeemer (the “Redeemer Property”). Although the

Complaint does not contain a count for breach of fiduciary obligation, the Diocese, as to both the possession count and the accounting count, sought to tax costs and attorney's fees against the Defendants for their alleged breach of trust obligations to the Diocese.

In Count One of the Amended Counterclaim, Defendant The Reverend Neil G. Lebhar, together with Defendants William Schroeder, Joey Nichols, Mary Reilly, Jan Thorwart, Lyle Ramsay, and Doralee Simko, as the Rector, Wardens and Vestry of the Church of the Redeemer (collectively, "the Defendants"), sought to quiet title to the Redeemer Church Property. In Count Two of the Amended Counterclaim, Defendants sought to impose a resulting trust over the Redeemer Church Property in favor of the Defendants. In Count Three of the Amended Counterclaim, Defendants sought to impose a constructive trust over the Redeemer Church Property in favor of the Defendants.

The Court has considered the motion, affidavits, and deposition testimony filed with the Court, as well as the excellent verbal and written argument of all counsel, and finds:

Facts

This action arises out of a dispute between the Plaintiff and the Defendants over who has the right to possess the Redeemer Church Property. The Diocese and the Church are constituent parts of the Protestant Episcopal Church in the United States of America. *See* Article II and Canon 21, Articles of Reincorporation and the Constitution and Canons of the Episcopal Church in the Diocese of Florida (the "Diocesan Canons"). The Right Reverend Samuel Johnson Howard is the Bishop of the Diocese of Florida. *See* Affidavit of the Right Reverend Samuel Johnson Howard, paragraph 1. The Church is an Episcopal church located at 7500 Southside Boulevard in Jacksonville, Florida and is a parish within the Diocese of Florida and the

Episcopal Church. *See* Bishop Howard Affidavit, paragraph 4. The Diocese acquired title to the Redeemer Church Property in 1985. *See* Bishop Howard Affidavit, paragraph 7. As of December 31, 2005, the Defendants were the Rector, Wardens and Vestry of The Church of the Redeemer. *See* Bishop Howard Affidavit, paragraph 6.

The Constitution and Canons of the General Convention for the Government of the Episcopal Church in the United States of America (the "Episcopal Church Canons") contain the articles for the governance of the Episcopal Church. *See* Bishop Howard Affidavit, paragraph 3. The Diocesan Canons contain the articles for the governance of the Diocese. *See* Bishop Howard Affidavit, paragraph 2.

Pursuant to the Diocesan Canons, the Bishop is the Ecclesiastical Authority of the Diocese. *See* Article VII, § 2, Articles of Reincorporation of the Episcopal Church in the Diocese of Florida. Father Neil G. Lebhar, who was the Rector of The Church of the Redeemer, served as the chair of the parish Vestry. *See* Diocesan Canons, Canon 23, § 4. Under Episcopal Church and Diocesan canon law, the Defendants, as members of the Vestry of the Church, were responsible for the temporal concerns of the parish and were required to fulfill responsibilities assigned to them by the Episcopal Church Canons and the Diocesan Canons. *See* Diocesan Canons, Canon 23, § 4. The Episcopal Church Canons impose on the Defendants the duty to hold all personal and real property of the Church in trust for the Diocese. *See* Episcopal Church Canons, Title I, Canon 7, § 4; Title I, Canon 7, § 5 and Title II, Canon 6, § 4.

In 2005, the Defendants found themselves in a serious theological dispute with the Bishop and considered it impossible to accept the direct ministry of the Bishop. *See* Affidavit of Father Neil Lebhar, paragraph 3. In 2005, the Defendants formed a new corporation under the

fictitious name, Redeemer Anglican Church. *See* Father Lebhar Affidavit, paragraph 10. In early 2006, the Defendants publicly announced that they had affiliated themselves with the Church of Uganda. *See* Bishop Howard Affidavit, paragraph 9.

As a result of that announcement, the Bishop, as the Ecclesiastical Authority of the Diocese, determined that the Defendants had abandoned the Episcopal Church and their offices as the Rector, Wardens and Vestry of the Church. *See* Deposition of the Right Reverend Samuel Johnson Howard, page 111, lines 8 through 14. The Bishop made that determination based on the Defendants' words and actions. *Id.* After the Bishop determined that the Defendants had abandoned their offices, the Bishop installed a new Rector, Wardens and Vestry of The Church of the Redeemer pursuant to his ecclesiastical authority under the Diocesan and Episcopal Church Canons. *See* Bishop Howard Affidavit, paragraph 11.

On March 3, 2006, the Diocese wrote a letter to the Defendants asking them to return possession of the Redeemer Property to the Diocese and to provide the Diocese with an accounting of the Redeemer Property. *See* Bishop Howard Affidavit, paragraph 13. The Defendants have not returned the Redeemer Property to the Diocese and have not accounted to the Diocese for the Redeemer Property. *See* Bishop Howard Affidavit, paragraph 13. The Defendants state that they did not abandon their offices as the Rector Wardens and Vestry of The Church of the Redeemer. *See* Father Lebhar Affidavit, paragraph 10. According to the Affidavit of the Right Reverend Stephen H. Jecko, neither the Diocesan Canons nor the Episcopal Church Canons authorize the Bishop to determine that the Defendants had abandoned their offices as the Rector, Wardens and Vestry of the Church, nor do they authorize Bishop Howard to install a new Rector, Wardens and Vestry for the church. *See* Bishop Jecko Affidavit,

paragraph 10. Bishop Jecko also contends that Bishop Howard did not follow canonical procedure when he determined that Defendants had left the Episcopal Church. *See* Bishop Jecko Affidavit, paragraphs 4 and 5; *see also* Father Lebhar Affidavit, paragraph 10. Father Lebhar asserts that "nothing in the constitution or the canons of the Diocese or ECUSA permit Bishop Howard to (mis)interpret Redeemer's actions as constituting abandonment." Father Lebhar Affidavit, paragraph 10.

Law: Summary Judgment Standard

A court may only grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Connell v. Sledge*, 306 So.2d 194, 196 (Fla. 1st DCA 1975). The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985). The burden of the movant in a motion for summary judgment is not simply to show that the facts support his own theory of the case but rather to demonstrate that the facts show that the party moved against cannot prevail. *Burkett v. Parker*, 410 So.2d 947, 948 (Fla. 1st DCA 1982).

If the pleadings, depositions, answers to interrogatories, admissions, affidavits and other evidence in the file raise the slightest doubt upon any issue of material fact then a summary judgment may not be entered. *Connell*, 306 So.2d at 196. The "issue," however, must be one of material fact. Issues of nonmaterial facts are irrelevant to the summary judgment determination.

A material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case. *Continental Concrete, Inc. v. Lakes at La Paz III Ltd. Partnership*, 758 So.2d 1214, 1217 (Fla. 4th DCA 2000) (emphasis in original; citations omitted).

Conclusions of Law

A. The Diocese is entitled to a summary judgment in its favor for possession of the disputed real and personal property.

States have a legitimate interest in resolving church property disputes; however, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. *Jones v. Wolf*, 443 U.S. 595, 602 (1979). The First Amendment commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). A state can resolve church property disputes without violating the First Amendment by either resolving the dispute under neutral principles of law or by deferring to the highest ecclesiastical authority of a hierarchical church. *See Jones*, 443 U.S. at 602. Florida has elected the second approach: in deciding a church property dispute, its courts will defer to the highest ecclesiastical authority of a hierarchical church. *Townsend v. Teagle*, 467 So.2d 772, 775 (Fla. 1st DCA 1985).

The Defendants filed their Amended Counterclaim "as the Rector, Wardens, and Vestry of the Church of the Redeemer," and in those capacities assert various defenses to the Diocese's Complaint under theories of quiet title (Count One), resulting trust (Count Two), and constructive trust (Count Three). *See Amended Counterclaim*, introductory paragraph. The

Defendants allege that it is through their capacities as the Rector, Wardens and Vestry of The Church of the Redeemer that they "occupy, maintain, manage and possess the Redeemer Church Property." *Id.*, paragraph 10. In 2006, however, the Bishop determined that the Defendants had withdrawn from the Episcopal Church and abandoned their offices. As a result of that determination, the Bishop installed other Episcopalians as the Rector, Warden and Vestry of The Church of the Redeemer. At the heart of this property dispute, therefore, is a disagreement between the Plaintiff and the Defendants regarding who has the right to occupy the offices of the Rector, Wardens and Vestry of the Church. The resolution of that religious dispute is for ecclesiastical authorities, not civil courts, to resolve. *See Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696, 709 (1976) ("Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals."). If the Episcopal Church and the Diocese are hierarchical in their governance structure, then this Court must accept the Bishop's decision as binding and cannot adjudicate or revisit the propriety of his decision. In *Serbian Eastern Orthodox Diocese*, the United States Supreme Court held that the First Amendment, as applied to the states through the Fourteenth Amendment, mandates that civil courts not disturb decisions of the highest ecclesiastical authority within a church of hierarchical polity:

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such

decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Serbian Eastern Orthodox Diocese, 426 U.S. at 709 (emphasis added).

Under Florida law, a church is considered hierarchical if it is organized into governing bodies of hierarchical ascending jurisdiction:

The [Presbyterian Church in the United States ("PCUS")] is a reformed religious body and is hierarchical in structure and government under its constitution. The structure and form of PCUS government and its Rules of Discipline are constitutionally expressed in the Book of Church Order. Under the Book of Church Order 1981-1982 PCUS is organized into governing bodies of hierarchical, ascending jurisdiction beginning at the local level with the Church Session, through the Presbytery, the Synod, to the national General Assembly. The Session is formed at the local church level and consists of the church pastor and ruling elders. The Presbytery consists of all the ministers and churches within a certain geographic district. The Synod is composed of lay and clergy representatives from the Presbyteries within a geographic area. The General Assembly is the highest PCUS court and represents all of the member churches.

Townsend v. Teagle, 467 So.2d 772, 773 (Fla. 1st DCA 1985) (emphasis added).

Like the Presbyterian Church in the United States, the Diocese and the Episcopal Church are hierarchical in structure and government under the Diocesan Canons and the Episcopal Church Canons. Parishes in the Diocese, including The Church of the Redeemer, are organized and exist pursuant to the Canons of the Episcopal Church in the Diocese of Florida. *See* Diocesan Canons, Canons 21 and 22. The Diocese is governed by the Bishop of the Diocese, and the Diocesan Convention is the legislative and chief policy making body for the Diocese. *See* Diocesan Canons, Canon 1, §§ 1 and 2. The Bishop of the Diocese is "the Ecclesiastical Authority of the Diocese." Articles of Reincorporation of the Episcopal Church in the Diocese of

Florida, Article VII, § 2. As such, he is the "highest ecclesiastical tribunal within the [Diocese]." *Serbian Eastern Orthodox Diocese*, 426 U.S. at 709; *see also Dixon v. Edwards*, 290 F.3d 699, 703, n.1 (4th Cir. 2002) (the highest ecclesiastical authority within an Episcopal diocese is the diocesan bishop). The Episcopal Church Canons set forth the articles for the governance of the Episcopal Church. *See* Episcopal Church Canons, Preamble. The Episcopal Church is governed by the General Convention, which consists of the House of Bishops and the House of Deputies. *See* Episcopal Church Canons, Article 1, § 1.

Without exception, courts which have considered the issue have determined, as a matter of law, that the Episcopal Church is a hierarchical church. *See, e.g., Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002)(affirming summary judgment and stating: "[O]ur study of the organization and operation of the Episcopal Church compels the determination that the [trial] court was correct in both its analysis and conclusion: The Episcopal Church is hierarchical.")(emphasis added); *Bennison v. Sharp*, 329 N.W.2d 466, 473 (Mich. App. 1982)(affirming summary judgment and stating: "The trial court correctly found that the Protestant Episcopal Church is hierarchically structured as a matter of law.")(emphasis added); *Hiles v. Episcopal Diocese of Massachusetts*, 744 N.E.2d 1116, 1121 (Mass. App. 2001)(affirming summary judgment and stating: "[T]he Episcopal Church is hierarchical in structure; there are no judicial holdings to the contrary.")(emphasis added; citations omitted).

There is no issue of fact that the Bishop in this case determined that the Defendants abandoned their offices as the Rector, Wardens and Vestry of The Church of the Redeemer, and installed a new Rector, Wardens and Vestry. As a matter of law, this Court cannot review or revisit the Bishop's replacement of the Defendants as the Rector, Wardens and Vestry of The

Church of the Redeemer. *See, e.g., Jones*, 426 U.S. at 602 ("the [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."); and *Serbian Eastern Orthodox Diocese*, 426 U.S. at 709 ("civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them") (emphasis added). Because the highest ecclesiastical authority in the Episcopal Church has determined that the Defendants are no longer the Rector, Wardens, and Vestry of The Church of the Redeemer, this Court cannot permit the Defendants to maintain their Counterclaim in those capacities.

The Defendants submitted the affidavits of Father Lebhar and Bishop Jecko in an attempt to frame an issue of fact about whether the Bishop properly exercised his authority, or even had the authority, to replace them as the Rector, Wardens and Vestry of the Church. The First Amendment will not allow this Court to resolve that dispute. As the Supreme Court said in *Serbian Eastern Orthodox*:

For civil courts to analyze whether the ecclesiastical actions of a church adjudicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the court adjudicatory to follow, or else in the substantive criteria by which they are supposed to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits....

Serbian Eastern Orthodox Diocese, 426 U.S. at 713.

Because the Court cannot review decisions of the ecclesiastical authority within a church hierarchy, the Defendants' affidavits do not create issues of material fact. *See Continental Concrete, Inc. v. Lakes at La Paz III, Ltd. Partnership*, 758 So.2d 1214, 1217 (Fla. 4th DCA 2000) ("A material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case.").

The Bishop decided the Defendants no longer have the right to occupy the Redeemer Church Property. This Court is bound to accept the Bishop's determination as to who holds offices within the hierarchical church and, consequently, who is entitled to occupy the property. In *Bennison v. Sharp*, 329 N.W.2d 466, 473 (Mich. App. 1982), the court found that:

[U]nder the polity theory, when a subordinate congregation or a faction thereof secedes from a hierarchical church, it has no right to retain church property where the governing body of the general church has determined that it is no longer the congregation or its legitimate successor for which the property was originally purchased or obtained.

Bennison, 329 N.W. 2d at 471 (emphasis added).

The Court concludes that: (i) there are no material issues of fact regarding the Diocese's entitlement to possession of the disputed property, and (ii) for the reasons recited above, the Diocese is entitled, as a matter of law, to a summary judgment in its favor for possession of that property.

The Court further concludes that, even if the Defendants still occupied the offices of the Rector, Wardens and Vestry of The Church of the Redeemer, the Diocese, as a matter of law,

would nevertheless be entitled to possession of the real and personal property of The Church of the Redeemer, because the Diocese is the lawful owner of the property. The Diocese holds the title to the Redeemer Church Property. There is no dispute on this issue. Defendants remain in possession of the Redeemer Church Property despite the Diocese's request¹ that they relinquish that possession. There is no dispute on this issue. As lawful owner of the Redeemer Church Property, the Diocese is entitled to possession of its real property. *See Crowder v. Miami Beach First Nat'l Bank*, 50 So.2d 174, 175 (Fla. 1951) ("The better title determines the right to possession.").

B. Defendants have voluntarily consented to the accounting sought by Count Two of the Complaint.

In the course of a post-hearing exchange of memoranda of law, counsel for the Defendants stipulated and agreed that the Defendants would cooperate with the Diocese and the new vestry in performing an accounting and inventory of the real and personal property at issue in this case. Except as to the costs and attorney's fees sought, this makes moot Count Two of the Complaint.

C. Genuine issues of material fact preclude a summary judgment for the Diocese on any claims for attorney's fees and costs arising out of an alleged breach of fiduciary duties by the Defendants to the Diocese.

Although the Diocese, in the preliminary allegations of its Complaint, alleges that: (i) the Defendants have breached fiduciary duties owed to it, and (ii) the Defendants are therefore statutorily obligated to pay the Diocese costs and attorney's fees, the Complaint does not contain

¹ The parties disagree when such request was made. Even had such request not been previously made, however, institution of this lawsuit constituted a demand by the Diocese for return of the real and personal property at issue.

an actual count for breach of fiduciary duty. Even were the Court to assume that the preliminary allegations of the Complaint sufficiently allege a claim founded on breach of fiduciary duty, the Court would question whether it could award the requested attorney's fees. The Court has found no case, and has been cited to no case, which addresses whether a court in an action arising out of a dispute within a hierarchical church may award attorney's fees under the involved statute² without impermissibly entangling the court in the internal decisions of, and conduct of, the church. The Court in this order need not resolve these issues of law because, even were they all to be decided in favor of the Diocese, there would nevertheless remain genuine issues of material fact regarding whether the Defendants breached fiduciary duties owed to the Diocese. The Court therefore must deny the Diocese a summary judgment on its claim for costs and attorney's fees flowing from an alleged breach of fiduciary duties.

ACCORDINGLY, it is ORDERED and ADJUDGED that:

(1) The Diocese's Motion for Summary Judgment is granted as to Count One of the Complaint and as to Counts One, Two, and Three of the Amended Counterclaim. The Diocese's Motion for Summary Judgment is denied as Count Two, and Count Two is made moot by the Defendants' voluntary agreement to provide the requested accounting and inventory..

(2) The Clerk is directed to enter a writ of possession of the property described in Exhibit A to the Diocese's complaint in favor of the Diocese.

(3) Defendants shall cooperate with the Diocese and the new Church of the Redeemer vestry in performing an accounting and inventory of the property at issue in this case. The parties shall confer in an effort to agree upon the form of, and method for, the accounting.. If, by May

² Section 737.627, Fla. Stat.

31, 2007, the Diocese does not receive an accounting and inventory satisfactory to it, then it may move the Court to convene a hearing to determine the time, place, and manner of the accounting and inventory.

(4) The Court retains jurisdiction to consider taxation of costs, not including attorney's fees, in favor of the Diocese as the prevailing party on the issues the issues of possession and accounting. Any such costs would be taxed, upon motion, at the conclusion of the case.

(5) The Court by this order does not resolve any of the legal or factual issues recited above concerning alleged breaches of fiduciary duty, or entitlement to attorney's fees or costs for such breach.

ENTERED in Jacksonville, Florida, on April 27, 2007. **ORDER ENTERED**

APR 27 2007

/s/ KAREN K. COLE

Karen K. Cole
Circuit Judge

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